

First Amendment Cosmopolitanism, Skepticism, and Democracy

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*This is a response to Professor Ronald J. Krotoszynski, Jr.'s review of my book, *The Cosmopolitan First Amendment: Protecting Transborder Expressive and Religious Liberties* (Cambridge University Press, 2014). The response explains the basic principles of First Amendment cosmopolitanism and highlights the importance of the First Amendment's transborder dimension. It also responds to skeptical and critical reactions to some of the book's arguments. Finally, the response elaborates on First Amendment cosmopolitanism's relationship to democratic values.*

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I. INTRODUCTION

I am immensely grateful for Professor Ronald J. Krotoszynski's thoughtful review of my book, *The Cosmopolitan First Amendment: Protecting Transborder Expressive and Religious Liberties*, and for his linking my work with that of Professor Martin Redish.¹ The review deftly combines two books that at first glance may appear to have little to do with one another, save that each is about the First Amendment.² My primary goals in this response are threefold: (1) to elaborate on the relationship between cosmopolitanism and the First Amendment's transborder dimension, (2) to respond to some skepticism regarding First Amendment cosmopolitanism, and (3) to highlight the connection between First Amendment cosmopolitanism and democratic values.

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¹ Ronald J. Krotoszynski, Jr., *Free Speech Paternalism and Free Speech Exceptionalism: Pervasive Distrust of Government and the Contemporary First Amendment*, 76 OHIO ST. L.J. 659 (2015).

² See generally MARTIN H. REDISH, *THE ADVERSARY FIRST AMENDMENT: FREE EXPRESSION AND THE FOUNDATIONS OF AMERICAN DEMOCRACY* (2013); TIMOTHY ZICK, *THE COSMOPOLITAN FIRST AMENDMENT: PROTECTING TRANSBORDER EXPRESSIVE AND RELIGIOUS LIBERTIES* (2014).

II. COSMOPOLITANISM AND THE FIRST AMENDMENT'S TRANSBORDER DIMENSION

Professor Krotoszynski's review focuses on one important aspect of my project—namely, a call for First Amendment protection for cross-border and beyond-border individual liberties, in particular freedom of speech.³ He supports my proposal in principle, although he is skeptical that U.S. courts—in particular, the Supreme Court—will move in this direction.⁴ I want to begin this response by describing my project and thesis more comprehensively, holding my response to skeptics, including Professor Krotoszynski, until Part III.

For the most part, Americans tend to treat the First Amendment primarily as a domestic concern. To be sure, we notice when our free speech doctrines or standards conflict with or differ from liberty regimes in other nations. However, by and large Americans tend to focus on protecting *domestic* freedom of expression and freedom of religion. There is, of course, plenty to be concerned about in this domain—i.e., the free speech rights of corporations, the rights of public protesters to assemble and speak, protection of press sources, the place of religious symbols in the public square, and the proper scope of religious accommodations. These are all important issues, worthy of the attention given them by scholars, commentators, and the public at large.

However, as I explain in the book, our First Amendment has another critically important dimension.⁵ Speech traverses and transcends international borders, citizens and non-citizens commingle across territorial boundaries for expressive and religious purposes, states and localities weigh in on matters of global concern, and the First Amendment is discussed, invoked, and defended in various global forums. Further, the fact that speech is increasingly subject to the laws of several nations at once raises challenging jurisdictional and conflicts of laws questions. Foreign libel judgments, foreign religious norms, and foreign plaintiffs are also creating distinctive challenges for courts and other U.S. officials concerned about preserving exceptional First Amendment protections. As my book discusses in Chapter Seven, religious and other charities also operate across international borders.⁶ Finally, the U.S. government interacts with citizens, aliens, and religious leaders and groups around the world. All of these things occur in what I refer to as the First Amendment's transborder dimension.

As it relates to expressive and religious liberties, the law of this transborder dimension is unsettled—or at least unclear in certain respects. It

³ See Krotoszynski, *supra* note 1, at 665–73.

⁴ See *id.* at 678 (“To be clear, I agree with Zick that [transborder] speech deserves a full measure of protection under the First Amendment. Existing doctrine, however, seems to cut strongly against this outcome.”).

⁵ See ZICK, *supra* note 2, ch. 1 (examining the First Amendment's “transborder dimension”).

⁶ See *id.* ch. 7.

would likely surprise many Americans that the letter they intend to send to an acquaintance or family member in Paris or Peru is not clearly protected by the First Amendment's free speech or press guarantees.⁷ International travel, cross-border association, charitable religious giving, and other cross-border expressive and religious activities are similarly subject to diminished First Amendment protection under U.S. precedents, laws, and regulations.⁸ As well, under the letter and logic of U.S. anti-terrorism policies, American citizens and aliens abroad may be subjected to censorship, reporting restrictions, and even prior restraints.⁹ These are just a few examples of basic liberties—speech, press, travel, association, and free exercise of religion—that Americans take for granted in their native land.

A central theme of my book is that we need to think more carefully and systematically about the First Amendment's foundations, principles, and domain as these things apply to a more globally interconnected citizenry, and a more porous world in which territorial borders are becoming less important to things like information flow and sovereign authority. However, as I explain in the book, once the discussion turns from expressive and religious activities within U.S. territorial borders, the First Amendment far too often tends to disappear.¹⁰ What might have been great First Amendment precedents have ultimately become foreign affairs, immigration, or national security precedents in which freedom of expression and religion play only minor roles. Too often, opportunities to connect U.S. citizens to foreign nations, or distant persons, have succumbed to a restrictive regime in which territorial and security justifications produce provincial laws and precedents.¹¹

Owing to various social and political developments, including globalization, the digitization of expression, and concerns about global terrorism, cross-border conversation and commingling have become critically important First Amendment concerns.¹² To be sure, transborder mobility, expression, association, and religious commingling are not yet *as* important as their domestic counterparts. However, they are becoming a focal dimension of First Amendment free expression, free association, and free exercise of religion.

The Internet is at the center of this change. Digitized speech is not completely constrained by geography. Indeed, in some respects it challenges

⁷ See *id.* at 142–45 (addressing the First Amendment status of cross-border communications).

⁸ See *id.* at 147–51 (discussing cross-border association), 232–34 (discussing cross-border religious activities), 239–40 (discussing charitable giving, or *zakat*).

⁹ See *id.* ch. 6 (examining expressive rights of citizens and aliens abroad).

¹⁰ See *id.* at 70–74 (criticizing judicial “quasi-recognition” of transborder expressive liberties).

¹¹ See ZICK, *supra* note 2, at 74 (“As an interpretive modality, quasi-recognition has at times licensed the political branches to enact laws, regulations, and policies that restrict transborder information flow, association, and other activities.”).

¹² See *id.* at 58–59 (discussing digitization and globalization).

old regimes of sovereign authority, which were based primarily on territorial boundaries. Sometimes fleetingly and sometimes more permanently, digitized speech resides in multiple nations at once. It flows not in letters and cables, but through vastly more efficient and powerful worldwide search engines. The peoples of the world are also more mobile than ever. Cheaper travel, international commitments to the free flow of persons across borders, and digitized communication have all facilitated robust transborder commingling.

The specter of terrorism is also shaping or transforming the First Amendment's transborder dimension. In the twenty-first century, the United States and other nations have an acute interest in regulating or policing speech, press, association, and religious liberties regardless of where they are exercised. As I discuss in Chapter Five of my book, Justice Holmes's concerns regarding "falsely shouting fire in a theater"¹³ now extend to a *global* theater in which speech rapidly traverses or sometimes transcends international borders, individuals associate in digital networks, and information is much more difficult to exclude from territories.¹⁴ The United States is actively engaged in a now-decades-long war with violent extremists who reside on both sides of the border. Whether America's enduring commitment to robust debate will extend to Koran-burners, terrorist sympathizers, and information intermediaries with global reach remains to be seen.

Beyond U.S. borders, in the community of nations, U.S. foreign policy now includes not just a specific Internet plank but, increasingly, an appreciation for the need to respect international human rights, manage religious pluralism, and facilitate engagement with religious leaders and organizations. Here, too, there are complications. For example, the Establishment Clause's geographic domain is as unsettled as the rest of the First Amendment's transborder dimension.¹⁵ The extent to which U.S. courts can or should enforce international human rights is a point of conflict. Moreover, as the United States continues to engage in diplomatic forums across the globe, it must contend with increasingly powerful corporate voices, state and local-level discourse regarding "glocal"¹⁶ concerns, and private citizens who wish to be heard on matters of global concern. All of this transnational cacophony can affect American statecraft around the world.

Two recent cases highlight some of the complications that can arise in the First Amendment's transborder dimension. In the first case, a group of American writers and producers sued the Chinese search engine Baidu, Inc. in

¹³ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

¹⁴ See ZICK, *supra* note 2, ch. 5 (examining harmful and other types of speech in the "global theater").

¹⁵ See *id.* at 255–62 (discussing the extraterritorial application of First Amendment anti-establishment standards).

¹⁶ Globalization can be defined as "the interpenetration of the global and the local resulting in unique outcomes in different geographic areas." George Ritzer, *Credit Cards and the Globalization of Nothing*, 24 ST. LOUIS U. PUB. L. REV. 313, 318 (2005) (citation omitted).

a U.S. district court in New York.¹⁷ The plaintiffs alleged that the state search engine's algorithms blocked Chinese and American citizens from discovering their pro-democracy material.¹⁸ The court dismissed the case, ruling that Baidu's search engine algorithms constituted speech entitled to protection under the First Amendment, and that Baidu was entitled to exercise its editorial discretion to suppress the flow of pro-democracy information.¹⁹ The court perceived no irony in its free speech ruling. It stated: "[T]he First Amendment protects *Baidu's* right to advocate for systems of government other than democracy (in China or elsewhere) just as surely as it protects Plaintiffs' rights to advocate for democracy."²⁰

In the second case, a civil rights organization based in Kampala, Uganda sued Scott Liveley, an American citizen residing in Springfield, Massachusetts, for violating international laws prohibiting the persecution of individuals based on sexual orientation and gender identity.²¹ Liveley was accused of fomenting harassment and intimidation of gays and others through his speech and association activities, which occurred both in Uganda and the United States.²² The Ugandan civil rights group sued Liveley under the federal Alien Tort Statute, which grants jurisdiction to U.S. courts in certain actions involving violations of the law of nations.²³ A federal district court in Massachusetts rejected Liveley's motion to dismiss the complaint, which was based in part on the argument that the First Amendment protects his expressive activities. With regard to Liveley's free speech arguments, the court concluded that he had incited "a crime against humanity" as well as participated in "management of actual crimes—repression of free expression through intimidation, false arrests, assaults, and criminalization of peaceful activity and even the status of being gay or lesbian—that no jury could find to enjoy the protection of the First Amendment."²⁴ The court also rejected Liveley's contention that his actions are protected by the First Amendment's Petition Clause, which guarantees the right to "petition the Government for a redress of grievances."²⁵ The court held that the Petition Clause does not extend to efforts to persuade *foreign* governments to change their laws.²⁶ A federal

¹⁷ *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433 (S.D.N.Y. 2014).

¹⁸ *Id.* at 434.

¹⁹ *Id.* at 440–43.

²⁰ *Id.* at 443 (emphasis added).

²¹ See *Sexual Minorities Uganda v. Liveley*, 960 F. Supp. 2d 304, 309–10 (D. Mass. 2013).

²² See *id.* at 311–13 (discussing allegations against Liveley).

²³ 28 U.S.C. § 1350 (2012) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

²⁴ *Liveley*, 960 F. Supp. 2d at 329.

²⁵ U.S. CONST. amend. I.

²⁶ *Liveley*, 960 F. Supp. 2d at 329.

appeals court recently rejected Liveley's appeal, allowing the case to proceed to trial.

The *Baidu* and *Liveley* cases highlight the important intersection between international borders and First Amendment expressive rights. They raise complicated jurisdictional and territorial issues. In the *Baidu* case, plaintiffs seek to hold a foreign search engine liable for suppression and censorship of pro-democracy information otherwise available on the Internet.²⁷ In the *Liveley* case, plaintiffs seek to hold an American citizen liable for communications and associative acts that occurred, in part, in Uganda.²⁸

In addition to raising questions about the territorial domain of First Amendment rights, the two cases demonstrate that, in the modern era, governmental regulatory and other sovereign concerns also traverse territorial borders. Both cases involve the exercise of sovereign authority over speech and other activities that occurred in more than one nation. The Internet is a global speech forum, and efforts to regulate expressive activities in that space will frequently implicate or affect more than one sovereign. Likewise, as citizens of the world travel and engage in expressive and religious activities, the laws of multiple nations and even supranational governance institutions may be implicated. The role of the First Amendment in international human rights litigation remains largely undefined.

We do not have a framework for thinking through transborder and transnational First Amendment issues and concerns like those raised in *Baidu* and *Liveley*. Courts, commentators, and elected officials have not devoted nearly the amount of time and energy to the First Amendment's transborder dimension as they have allotted to its domestic domain. Unlike other First Amendment works, my book focuses specifically on the problems of this dimension.

What approach ought we to take to the myriad transborder expressive and religious concerns that are likely to arise in the transborder dimension? What, if any, restraint does the First Amendment place on American officials who seek to restrict or prevent cross-border conversation or commingling? To what extent does it shield Americans' expressive activities abroad, or protect the expressive activities of aliens? What ought to be our approach to foreign expressive and religious laws and principles that seek entry, physically or otherwise, to our shores? What relevance or purpose does the First Amendment have in terms of U.S. engagement with the larger community of nations? These are some of the principal questions I examine in the book. Some, including those assessing the scope of free speech and association, require doctrinal assessments and answers. Others raise concerns that transcend domestic adjudication and the particulars of First Amendment doctrine. All require that as a polity, the United States think carefully about what it means to have First Amendment rights in a globalized society.

²⁷ *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 434 (S.D.N.Y. 2014).

²⁸ *See Liveley*, 960 F. Supp. 2d at 304.

To that end, the book describes and defends a “cosmopolitan” First Amendment.²⁹ As a perspective or orientation regarding the First Amendment’s transborder domain, cosmopolitanism differs markedly from its provincial or parochial counterpart. In the book, I summarize provincialism as denoting “a general orientation regarding the First Amendment that is limited in terms of geographic range or scope, somewhat insular in terms of outlook and biases, and strongly exceptionalist.”³⁰ Unlike the provincial account, which generally focuses attention inward, First Amendment cosmopolitanism gazes outward to and beyond America’s territorial borders. The cosmopolitan First Amendment recognizes a broader territorial domain, is more welcoming of foreign persons, ideas, attachments, and authorities, views transborder conversation and commingling as central First Amendment activities and concerns with global implications, and seeks to globally situate—and sometimes even challenge—First Amendment exceptionalism.³¹

First Amendment cosmopolitanism seeks to integrate and, where possible, apply First Amendment principles and values in an interconnected, pluralist, and globalized world. Its principles and proposals are directed mainly at U.S. officials, institutions, and citizens. Among other things, a cosmopolitan approach to the First Amendment supports the following substantive results: full protection for citizens’ First Amendment rights regardless of borders or frontiers; a response to the threat of global terrorism that respects and preserves, to the fullest extent possible, cross-border conversation and commingling; and protection for the expressive and religious liberties of aliens who are within the custody and control of U.S. authorities and subject to American laws

Cosmopolitanism offers a lens or perspective from which to consider transborder First Amendment issues. It is not a roadmap or blueprint for generating a unitary global regime of expressive and religious liberties. Cosmopolitanism does not support or call for jettisoning fundamental First Amendment principles in favor of purportedly more “enlightened” foreign ones. At the same time, cosmopolitanism does not support or entail global exportation of First Amendment doctrines and standards to foreign regimes. Any “one-size-fits-all” approach, whether influenced by exceptional American or international standards, would be doomed from the start. Indeed, there are many nations across the world that will likely never come to respect anything like the commitment to expressive and religious freedoms enshrined in our First Amendment. For the many nations that do protect these liberties to a significant degree, my book examines some common ground but also addresses points of intersection and conflict.

²⁹ See ZICK, *supra* note 2, at 76–100 (describing the principles of First Amendment cosmopolitanism).

³⁰ *Id.* at 62; see also *id.* at 62–76 (discussing characteristics of First Amendment provincialism).

³¹ See *id.* at 77 (summarizing principles of First Amendment cosmopolitanism).

Returning to the *Baidu* and *Liveley* cases, we can get a more concrete sense of how a cosmopolitan approach would influence or affect actual results in the First Amendment's transborder dimension. Baidu, a foreign speaker, was hailed before a U.S. court and subjected to U.S. civil rights laws for its expressive activity on the Internet. Although Baidu's censorship strikes at the heart of core First Amendment principles, including respect for democratic rule and access to information about democratic forms of government, as the district court concluded, the First Amendment protects the rights of all speakers subject to U.S. laws to advocate in favor of non-democratic principles. The United States may press China diplomatically and otherwise to change its perspectives and its actions at home, but when it or its people are subject to U.S. laws, cosmopolitanism requires that First Amendment protections apply with full force.

The *Liveley* case is more complicated, in part owing to some uncertainty regarding whether U.S. alien tort law applies extraterritorially.³² Assuming it does, plaintiffs are seeking to hold an American speaker liable for speech uttered, in part, beyond U.S. borders, which they contend violates the law of nations.³³ Under a cosmopolitan approach, the First Amendment protects citizens from censorship or suppression of speech at the hands of their own government—regardless of geographic location. However, it does not operate as a shield for American speakers who ignore foreign and international laws when they act beyond U.S. shores.³⁴ Foreign governments and international bodies are not bound by the First Amendment and are entitled to enforce their laws against citizens and aliens alike.

Some might object that if a U.S. court were to enter judgment against *Liveley* for engaging in what would be protected speech and association if these things occurred solely within the United States, the court would be replacing exceptional First Amendment free speech protections with less-protective international standards.³⁵ In Chapter Nine, I discuss an approach to potential conflicts like this that I refer to as “cosmopolitan engagement.”³⁶ Under this approach, American courts would take seriously the claims of foreign nations and international institutions to enforce their own laws (including their own speech laws) and values. The First Amendment would not act as a shield at the border, excluding all foreign judgments, laws, and

³² See *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 1664 (2013) (describing a presumption against extraterritorial application).

³³ See generally *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433 (S.D.N.Y. 2014).

³⁴ See *ZICK*, *supra* note 2, at 331 (“[W]hen U.S. citizens visit abroad, their speech and other activities are subject to regulation under the libel, hate speech, and other laws in force in host nations.”).

³⁵ Of course, this assumes that *Liveley*'s speech would be protected under the First Amendment. The district court concluded that *Liveley*'s speech was in furtherance of an international crime. *Sexual Minorities Uganda v. Liveley*, 960 F. Supp. 2d 304, 329 (D. Mass. 2013).

³⁶ *ZICK*, *supra* note 2, ch. 9.

transnational legal authorities. Rather, in cases of transnational conflicts, courts would engage in a cosmopolitan choice of law analysis that focuses on, as Paul Berman has written, “the extent to which the various parties might be deemed to have affiliations with the possible communities seeking to impose their norms.”³⁷ Thus, if Liveley engaged in a significant portion of the contested expressive activities abroad, and his speech clearly violated international laws, the First Amendment would not necessarily bar the alien tort lawsuit. On the other hand, if most of the expressive activity occurred within the United States and if it were clearly protected under American free speech standards, under a cosmopolitan approach the First Amendment would bar enforcement of international law.

As the Liveley case shows, First Amendment cosmopolitanism does not always lead to rigid rules or definitive answers to transborder questions. Under the provincial approach, courts have generally tended to avoid transborder concerns by ruling that foreign and domestic plaintiffs lack standing to challenge certain cross-border restrictions, grudgingly accepting that U.S. citizens *might* have some First Amendment rights at and beyond our borders, and deferring to federal officials in cases involving cross-border and transborder claims.³⁸ American legislators have responded to efforts to enforce foreign speech laws by banning their recognition or enforcement in U.S. courts.³⁹ First Amendment cosmopolitanism rejects these approaches as insufficiently respectful of foreign laws and interests where transborder speech conflicts arise. Unlike its provincial counterpart, cosmopolitanism requires that courts and other officials grapple with thorny inter-jurisdictional concerns rather than reflexively invoke the First Amendment whenever expressive activities are involved. Courts and officials can and should preserve fundamental First Amendment principles. However, they should not do so at the expense of foreign victims and foreign governments who also have significant transnational interests.

There is nothing radical in either cosmopolitanism’s approach or its prescriptions. Indeed, as I argue in the book, cosmopolitanism is part of the marrow of our First Amendment.⁴⁰ Our Founders were wary of some foreign influences, but did not fear cross-border conversation and commingling—indeed, they openly and enthusiastically welcomed it. They recognized dangers and threats from abroad, but did not treat foreign persons and ideas as

³⁷Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflicts of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819, 1822 (2005). Chapter Nine describes the approach in detail and applies it to things such as recognition of foreign libel judgments. See generally ZICK, *supra* note 2, ch. 9.

³⁸See, e.g., ZICK, *supra* note 2, at 70–74 (describing provincialism’s “quasi-recognition” of transborder liberties).

³⁹See *id.* at 334–35 (discussing the federal SPEECH Act, which bars enforcement of foreign libel judgments).

⁴⁰See *id.* at 77–82 (describing constitutional origins of First Amendment cosmopolitanism).

inherently dangerous. The Founders and early Americans participated in a “republic of letters” that crossed international borders.⁴¹ They respected and in some cases imitated foreign laws. As our Declaration of Independence attests, the architects of American government had a “decent respect [for] the opinions of mankind.”⁴² In many respects, America’s Founders and subsequent generations were themselves cosmopolitans.

Of course, nativism and xenophobia have also been on prominent display during various periods of American history. At their core, many of the critical battles regarding First Amendment freedoms involved fear of foreigners, discomfort or hatred of foreign ideas, and distrust of foreign religions.⁴³ The very First Amendment principles that have laid many of those fears to rest, and pushed the nation toward support for a pluralistic culture that has welcomed (or at least tolerated) foreign influences are *cosmopolitan* principles. All of the principal American First Amendment free speech theories or justifications—self-government, the search for truth, and individual autonomy—are consistent with granting protection to transborder expressive liberties.⁴⁴ Moreover, our history and doctrines relating to religious freedom support extending free exercise and anti-establishment limitations to foreign visitors, foreign laws, and the actions of U.S. officials wherever they are located.⁴⁵

In sum, the First Amendment’s origins and best traditions support protecting the right to receive information originating in foreign nations, welcoming visitors to our shores for expressive and religious purposes, reporting on matters of global concern from foreign locations, and reaching across territorial borders to associate with persons and organizations. At a minimum, First Amendment cosmopolitanism seeks equality of recognition for these and related transborder rights.

However, in a broader sense, First Amendment cosmopolitanism posits a role for First Amendment rights, principles, and norms in global forums. This aspect of First Amendment cosmopolitanism is the subject of Part III of the book. At first glance, the First Amendment would seem to have little relevance to official U.S. activities within the community of nations. International diplomacy and foreign relations are not typically the domain of individual rights. However, a more cosmopolitan approach to the First Amendment’s transborder dimension highlights areas and contexts in which free speech and religious liberty principles can guide U.S. behavior in global forums.

With regard to the community of nations, in substance First Amendment cosmopolitanism supports the following: as mentioned, a pluralistic approach

⁴¹ See David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 974 (2010) (discussing the early transborder “republic of letters”).

⁴² THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

⁴³ See ZICK, *supra* note 2, at 65–66 (discussing twentieth century efforts to suppress “foreign” ideologies and discrimination against “foreign” religious faiths).

⁴⁴ See *id.* at 85–90 (discussing First Amendment justifications and cosmopolitanism).

⁴⁵ See *id.* at 229–32 (examining justifications for transborder religious liberties).

to judgment enforcement and foreign laws (including foreign speech laws) that respects the liberty regimes and interests of foreign governments and peoples; an expressive or “discursive” approach to debates in global and international forums that allows for multiple voices and respects dissenting views; and an agenda for exporting First Amendment values that is robust and confident, but also sensitive to foreign concerns about unlawful intervention and rights imperialism. More specifically, First Amendment cosmopolitanism proposes that U.S. officials alter their approach to enforcement of foreign judgments, permit or affirmatively invite individuals and sub-national governments to weigh in on matters of global concern, honor their obligations to neither directly support nor suppress religious activities abroad, participate in rather than boycott treaty and other negotiations (even if they will not lead to adoption of First Amendment standards), and calibrate policies such that American free expression and religious liberty principles are suggested and robustly defended but not imposed on foreign regimes.

In sum, cosmopolitan principles support and facilitate conversation and commingling not just at the individual level, but also at the national and international levels. From a cosmopolitan perspective, the First Amendment’s domain extends beyond the province of individual liberties to the manner in which the community of nations discusses and enforces core principles and commitments relating to expressive and religious rights.

III. SKEPTICISM REGARDING FIRST AMENDMENT COSMOPOLITANISM

Some Americans are likely to be skeptical with regard to, or even strongly oppose, some of the cosmopolitan principles or substantive results discussed in my book. First Amendment provincialism has a long and firm hold on the American legal system and the public’s imagination. It is firmly embedded in American laws, policies, and institutions.

In certain cases, the stakes of cross-border conversation and commingling are likely to be very high indeed. Cross-border expression and association may have deadly effects, and certain kinds of transborder information flow can be quite dangerous. What is more, governments have strong interests in protecting their citizens, policing territorial borders, and preserving national security. Similarly, some maintain that the First Amendment must be protected against foreign judgments and similar encroachments, which threaten to undermine if not displace traditional protections for free speech and religion. Others would argue that First Amendment principles and values have little force or influence in the often murky areas of diplomacy and foreign relations.

I respond to these and other concerns in the book, and will not repeat each of the cosmopolitan rejoinders. Put simply, while I acknowledge these concerns, cosmopolitanism rejects the second-class treatment of transborder First Amendment rights. Concerns regarding dangerous speech and association are hardly specific to the transborder dimension. Domestic speakers and groups pose serious, even deadly, threats to individuals and to civil peace. Yet,

as Professor Krotoszynski observes in his review, we do not permit government to suppress or restrict domestic expression on this basis alone.⁴⁶ For example, we do not permit the U.S. government to criminalize mere advocacy by *domestic* organizations of terrorism or terrorist causes.⁴⁷ Rather, even in the face of serious threats to public order and safety, we insist that officials respect and enforce expressive and religious liberties to their fullest extent. Why, then, do these obligations disappear when *foreign* organizations are the targets of governmental sanction?⁴⁸

With regard to the community of nations, cosmopolitanism recognizes the obvious fact that the United States is part of an interconnected web of global forums, institutions, and relationships. It acknowledges the extent to which private individuals, corporations, and sub-national governments *already* participate in a robust global discourse.⁴⁹ Indeed, it encourages Congress and other institutions to leverage that participation for expressive and democratic ends.⁵⁰ More generally, cosmopolitanism offers a perspective or approach for engaging with other nations and peoples—one that gives due respect to the opinions of mankind, while making the most persuasive case possible for retaining our exceptional First Amendment doctrines and principles. Thus, for example, in the *Baidu* case the United States ought to extend First Amendment protections to foreign regimes and organizations even if they do not share our democratic values. In the *Liveley* case, the United States could extend recognition and respect to international laws even though this may be somewhat at odds with certain First Amendment principles.

To those who say we do not owe other nations any explanation, quarter, or defense when it comes to free speech or religion, cosmopolitanism's response is that this perspective ignores America's deeply embedded and influential place in the world. This breed of exceptionalism also fails to give due consideration to the very principles the United States purports to be defending—not just at home, but across the globe. In First Amendment terms, what could be more appropriate than teaching a foreign regime—even an autocratic and repressive one—about democracy and tolerance by extending to it the very expressive protections it denies to others? Conversely, what message is conveyed when U.S. courts refuse to enforce international and

⁴⁶ See Krotoszynski, *supra* note 1, at 686 (“For a people so reflexively hostile to government interventions in speech markets, why are we so trusting when the government tells us that a particular speaker is too dangerous to be permitted in the United States?”).

⁴⁷ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (protecting advocacy of governmental overthrow so long as speaker does not expressly advocate imminent unlawful action that is likely to occur).

⁴⁸ See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–38 (2010) (sustaining under strict scrutiny a ban on the provision of “material support,” in the form of coordinated expression, to foreign terrorist organizations).

⁴⁹ See ZICK, *supra* note 2, at 270–74 (discussing participation by sub-national governments, individuals, and private corporations).

⁵⁰ See *id.* at 281–96 (applying free speech principles to foreign affairs discourse).

other foreign laws against American citizens who foment violence or violate basic human rights abroad? First Amendment cosmopolitanism acknowledges that the United States cannot simply wall itself off from the rest of the world and ignore the many expressive and religious liberty regimes that differ from our own. It provides a perspective that may be useful in terms of engaging with other nations, one that makes the most persuasive case possible for retaining our exceptional First Amendment doctrines and principles while at the same time exhibiting due respect for the opinions and rights of mankind.

Professor Krotoszynski's review expresses strong skepticism regarding certain aspects of First Amendment cosmopolitanism. Although he is sympathetic to my claims regarding protection for Americans' transborder liberties, Professor Krotoszynski argues that "the prospects for convincing the Supreme Court to afford transborder speech greater solicitude seem meager."⁵¹ As well, Professor Krotoszynski writes that he is "very skeptical that United States courts will prove receptive to considering and engaging foreign free speech law when deciding First Amendment claims."⁵²

In response, I would first reiterate that protection for citizens' transborder First Amendment liberties is just one aspect of First Amendment cosmopolitanism. Part II of the book examines an array of cross-border activities that I contend deserve, but have thus far been denied, full First Amendment recognition.⁵³ These various activities comprise or facilitate "conversation and commingling" in transborder spaces, not only through expression but also through association, press, assembly, and religious activities.⁵⁴ However, Part III of the book ventures into the deeper and even less settled waters of the community of nations.⁵⁵ It advances the argument, discussed earlier, that a more cosmopolitan First Amendment would benefit an array of U.S. policies and practices within the community of nations.⁵⁶ As the discussion in Part II of this response shows, focusing solely on protection for U.S. citizens' First Amendment transborder liberties understates the broader scope or domain of my project.

Similarly, in focusing solely on *judicial* recognition and protection for cross-border liberties, the review does not address the book's argument that other officials are also obligated to recognize and protect transborder liberties. To be sure, my book focuses on a number of deficient judicial doctrines and precedents. However, it encourages not just, or even primarily, American courts to adopt and articulate cosmopolitan values and principles. Rather, I

⁵¹ Krotoszynski, *supra* note 1, at 678.

⁵² *Id.*

⁵³ See ZICK, *supra* note 2, pt. II.

⁵⁴ *Id.*

⁵⁵ *Id.* pt. III.

⁵⁶ *Id.*

contend that cosmopolitan First Amendment principles ought to guide legislators, agencies, and executive officials as well.⁵⁷

Thus, for example, I propose that Congress finally repeal the Logan Act of 1799, which purports to restrict Americans' communications to foreign regimes or officials engaged in disputes with the United States.⁵⁸ My book celebrates Congress's recent repeal of Smith-Mundt Act restrictions on domestic dissemination of U.S. foreign propaganda.⁵⁹ Americans ought to know what their government is saying on their behalf, regardless of where it happens to be speaking. The book proposes that lawmakers repeal international travel bans and other restrictions that interfere with cross-border inquiry and commingling.⁶⁰ Relatedly, it urges executive officials to disclaim any authority to exclude foreign nationals from the United States solely on ideological grounds.⁶¹ It also encourages the United States to fully live up to its longstanding treaty obligations, and to permit the free flow of persons and information across borders.⁶² Finally, the book questions the executive's power to target American speakers abroad in lethal drone operations, at least insofar as the sole or primary basis for the targeting is protected expression.⁶³

One might lack confidence that legislators and other government officials will be any more receptive to cosmopolitan concerns than courts. However, these officials are motivated by economic, diplomatic, and other concerns that can translate into more cosmopolitan policies. Thus, for example, President Obama recently announced the normalization of diplomatic relations with Cuba.⁶⁴ If this ultimately leads to the repeal of the Cuba travel embargo, American and Cuban citizens will be able to converse and commingle in ways—artistic, literary, scientific, etc.—that have not been possible since the ban was imposed many decades ago.

Along with other scholars, I also discuss the influence that federal agencies, expert technologists, and information intermediaries will have in shaping the future of cross-border information sharing.⁶⁵ I encourage U.S.

⁵⁷ See, e.g., *id.* at 128 (“Even if the Supreme Court fails to deliver, the political branches can act on their own to facilitate cross-border exchange between citizens and foreign visitors.”).

⁵⁸ 18 U.S.C. § 953 (2012).

⁵⁹ See ZICK, *supra* note 2, at 298 (discussing partial repeal of the Smith-Mundt Act).

⁶⁰ See *id.* at 109–20 (advocating a robust First Amendment right to travel abroad).

⁶¹ See *id.* at 128 (encouraging Congress and the State Department to clarify that ideological exclusions are prohibited under federal law).

⁶² See *id.* at 154 (noting that the United States has entered into international agreements that obligate it to respect the free flow of persons and information “without regard to frontiers”).

⁶³ *Id.* at 194–95.

⁶⁴ Peter Baker, *America Is Freed—Surprise Deal Ends Long Stalemate*, N.Y. TIMES, Dec. 18, 2014, at A1.

⁶⁵ ZICK, *supra* note 2, at 156 (noting that “future debates regarding global information policy are likely to focus less on judicial interpretations of the First Amendment or traditional regulatory methods than on regulatory policies concerning new technologies,

officials and experts to be mindful of the First Amendment's cosmopolitan dimension as they work out the terms and structures of global communication, in areas ranging from intellectual property to global surveillance.⁶⁶ In particular, the book recommends against enacting American intellectual property laws that will have adverse effects on the cross-border and beyond-border flow of information.⁶⁷ I also call on U.S. executive and legislative officials to cease pressuring social media and other information intermediaries to remove content from their sites absent appropriate legal safeguards.⁶⁸

My book criticizes the federal SPEECH Act, which prohibits enforcement of nearly all foreign libel judgments in U.S. courts.⁶⁹ It also denounces, and urges state legislatures to reject, xenophobic laws designed to prohibit courts and other officials from recognizing and enforcing "foreign" expressive and religious laws.⁷⁰ The book suggests that Congress amend anti-terrorism laws to ensure that core religious practices such as prayer and religious worship are exempted, and that executive officials review policies disproportionately affecting cross-border religious charitable giving.⁷¹

Beyond U.S. borders, the book urges U.S. diplomats to adopt a more cosmopolitan perspective in treaty negotiations and foreign relations interactions.⁷² It proposes that in certain foreign relations contexts, Congress consider adopting a First Amendment-influenced "dialogic" model that encourages sub-national and other voices to participate in global forums.⁷³ The book urges executive officials to respect Establishment Clause limits, even when they are acting abroad.⁷⁴ It advises that U.S. agencies engaged in propaganda and information campaigns abroad take into account cosmopolitan concerns regarding foreign communities, foreign press, and international obligations.⁷⁵ The book suggests that similar considerations influence international trade policies, particularly as they relate to media products and services.⁷⁶ It argues, too, that "[i]n its efforts to export free speech norms and

Internet access, intellectual property, and the sharing of data and other information" (citation omitted)).

⁶⁶ See *id.* at 156–60 (outlining some cosmopolitan terms for a twenty-first century global information policy).

⁶⁷ See *id.* at 158 (discussing recent U.S. proposals for addressing global online piracy).

⁶⁸ *Id.* at 159.

⁶⁹ See *id.* at 334.

⁷⁰ See *id.* at 342.

⁷¹ ZICK, *supra* note 2, at 246–47.

⁷² See *id.* at 318–25 (discussing treaty-making and international diplomacy).

⁷³ See *id.* at 290–93 (discussing dialogic foreign affairs federalism).

⁷⁴ See *id.* at 255–62 (examining the extraterritorial application of the Establishment Clause).

⁷⁵ See *id.* at 296–99 (discussing foreign political propaganda).

⁷⁶ See *id.* at 361–66.

practices through free trade, the United States must respect international law and the sovereignty of foreign nations.”⁷⁷

In sum, my book offers a broad, multi-institutional approach that is not limited to, or by, what American judges can or are willing to decide. That said, I believe that judges could play an important role in recognizing and enforcing cosmopolitan First Amendment principles and rights. My cosmopolitan approach builds on the work of scholars such as Rodney Smolla, Lee Bollinger, and Jack Balkin, all of whom to one degree or another contend that courts should adopt and articulate First Amendment principles for the modern era.⁷⁸ Some of these scholars appear to have more faith in courts (particularly the Supreme Court) than I do in this regard, while others view the judicial role as more marginal than my book suggests. What we all have in common is a desire to see our First Amendment properly situated in an increasingly interconnected world.

The Supreme Court has at least tacitly acknowledged citizens’ interests in receiving information from abroad, their right to invite and receive foreign visitors, and the possibility of some extraterritorial First Amendment coverage.⁷⁹ Thus, the seeds of a more cosmopolitan approach were planted some time ago. One of my goals is to urge that they be harvested. Following Lee Bollinger’s lead with regard to freedom of the press, my book sketches the contours of a cosmopolitan freedom of information doctrine that includes fully recognized rights to transmit and receive information without regard to borders, to host and commingle with foreign visitors, to associate across borders, and to access information through electronic and other channels.⁸⁰

The current Supreme Court is not without cosmopolitan members. Justice Anthony Kennedy is well-known for his trips abroad, his engagement with judicial officials from other nations, and his citation of foreign legal authorities.⁸¹ Justice Stephen Breyer has indicated that he is open to considering how foreign courts interpret expressive liberties.⁸² It is not clear

⁷⁷ ZICK, *supra* note 2, at 363 (citation omitted).

⁷⁸ See LEE C. BOLLINGER, *UNINHIBITED, ROBUST, AND WIPE OPEN: A FREE PRESS FOR A NEW CENTURY* (2010); RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* (1992); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004).

⁷⁹ See *Haig v. Agee*, 453 U.S. 280, 308 (1981) (assuming, without deciding, that American citizens have some free speech rights while abroad); *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972) (recognizing citizens’ interest in inviting and receiving foreign visitors); *Lamont v. Postmaster General*, 381 U.S. 301, 305 (1965) (invalidating postal prior restraint on receipt of propaganda originating abroad).

⁸⁰ See ZICK, *supra* note 2, at 153–54 (describing what could be a “landmark” Supreme Court decision along these lines).

⁸¹ See Jeffrey Toobin, *Swing Shift: How Anthony Kennedy’s Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER, Sept. 12, 2005, at 42–51 (observing that Justice Kennedy “has a passion for foreign cultures and ideas”).

⁸² See Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen*

whether the Court's newest members, Justices Kagan and Sotomayor, will generally embrace a provincial model of First Amendment transborder liberties or would be open to a more cosmopolitan perspective.

Robust protections for domestic free speech and association were not built in years, but rather in decades and in some cases over centuries. Courts need time to digest new technologies, distinctive threats, and transformations of domestic institutions like the press. As Professor Krotoszynski contends, some of the Supreme Court's most recent decisions, including *Holder v. Humanitarian Law Project*,⁸³ do not provide cause for optimism that a broad cosmopolitan turn is in the making.⁸⁴ However, *New York Times v. Sullivan*,⁸⁵ *Brandenburg v. Ohio*,⁸⁶ and other speech-protective precedents were the product of experiences involving new threats, distinctive harms, and modern concerns that pre-dated the decisions by many decades. It took the Supreme Court until 1964 to discover the "central meaning of the First Amendment."⁸⁷ It may take it several more decades to discover that core First Amendment principles apply to transborder liberties. As Justice Breyer suggested in the wake of the infamous Koran-burning episode involving Pastor Terry Jones, which I discuss in the book, questions relating to the First Amendment's transborder dimension "will be answered over time in a series of cases which force people to think carefully" about how to apply the First Amendment in an era characterized by digitized expression and relatively borderless spaces.⁸⁸

Still on the subject of judicial cosmopolitanism, Professor Krotoszynski makes the further, and to me somewhat surprising, claim that dialogue between domestic and foreign courts—and, presumably, also among U.S. and foreign political leaders—would not be a very welcome development. He argues that "a transnational judicial conversation would seem more likely to produce greater frustration and ill-feelings over the absence of shared constitutional values than newfound common ground about how best to reconcile conflicting constitutional commitments to free speech and human dignity."⁸⁹

Breyer, 3 INT'L J. CONST. L. 519, 537 (2005) ("If, for example, a foreign court, in a particular decision, had shown that a particular interpretation of similar language in a similar document had had an adverse effect on free expression, to read that decision might help me to apply the American Constitution.").

⁸³ *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

⁸⁴ Krotoszynski, *supra* note 1, at 676 ("The Supreme Court, ostensibly applying strict scrutiny, easily sustained a ban on speech and association with foreign groups alleged to support terrorism.").

⁸⁵ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁸⁶ *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

⁸⁷ *Sullivan*, 376 U.S. at 273.

⁸⁸ Kate McCarthy, *Justice Stephen Breyer: Is Burning Koran "Shouting Fire in a Crowded Theater?"*, ABC NEWS (Sept. 14, 2010, 6:52 AM), <http://abcnews.go.com/blogs/politics/2010/09/justice-stephen-breyer-is-burning-koran-shouting-fire-in-a-crowded-theater/>, archived at <http://perma.cc/C6VL-Q7D4>.

⁸⁹ Krotoszynski, *supra* note 1, at 675.

I find this skeptical assertion surprising for a few reasons. First, in his own comparative free speech scholarship, Professor Krotoszynski has extolled the virtues of transnational discourse and comparison. As he has persuasively argued: “It seems entirely fitting that the free speech project itself should serve as an object of national—and international—debate. A commitment to free speech without a commitment to discourse and debate on the substance of the right would be more than a little bit ironic.”⁹⁰ Professor Krotoszynski has also observed that “[t]he ideology of free speech seems to have serious transnational salience.”⁹¹ Even if this were not the case, the idea that transborder discourse about expressive and other rights would be unwelcome because some participants might experience “frustration and ill-feelings” is itself antithetical to core First Amendment principles. Again, the point of the dialogue is not to generate doctrinal orthodoxy but to question and debate diverse approaches to common problems. As Judge Benjamin Cardozo once observed, “We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.”⁹²

Perhaps, as Professor Krotoszynski’s comments suggest, the peoples of the world have reached a point where they have learned all they can from one another regarding expressive liberties and human rights. I hope that is not the case. To be sure, we will not agree on all of the particulars. However, the United States may convince other nations (perhaps, eventually, even some autocratic regimes) that speech rights ought to be human rights in the broadest sense of that phrase. The United States can also learn from the international human rights paradigm, which highlights the importance of things such as the free movement of persons and ideas across frontiers.

Ultimately, as I observe in the book, transnational discourse may convince Americans that we have properly calibrated autonomy, liberty, and dignity concerns in our approach to freedom of speech and that we have properly divided church and state.⁹³ Like other nations, we may come away from the conversation more firmly believing in our core principles and convictions. There is value in that confirmation.⁹⁴ Part of the value may be the ability to better articulate *why* it is that incitement, sharp criticism of government, and some forms of hate speech must be protected—even, or perhaps especially, in a digitized and globalized world. What is all but certain is that invoking First

⁹⁰ RONALD J. KROTOSZYNSKI, JR., *THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH* 222 (2006).

⁹¹ *Id.* at 215.

⁹² *Loucks v. Standard Oil Co.*, 120 N.E. 198, 201 (N.Y. 1918).

⁹³ See ZICK, *supra* note 2, at 316–17 (discussing the possible outcomes of transnational engagement).

⁹⁴ See VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* 75 (2010) (“The willingness to look outside—for confirmation, for challenge, to check one’s own judgment—illustrates the way in which foreign practice can function as an interlocutor of domestic law . . .”).

Amendment exceptionalism as a conversation-stopper will not facilitate rational debate or convince other nations to follow America's lead.

In sum, the cosmopolitan approach that I propose is firmly grounded in First Amendment principles and norms. It is cognizant of contemporary conditions, such as the decreased salience of territorial borders, the complexities relating to overlapping jurisdiction, and the powers and perils of digital connectivity. *The Cosmopolitan First Amendment* is not a book narrowly focused on First Amendment doctrines, as interpreted solely by courts. Rather, the book calls for a holistic and long-overdue consideration of an array of transborder expressive and religious concerns. It emphasizes the First Amendment's potential to facilitate cross-border conversation and commingling, its ability to frame international diplomacy, and its place among global expressive and religious liberty regimes.

IV. COSMOPOLITANISM AND DEMOCRACY

In this final part of my response, I want to address the intriguing connection Professor Krotoszynski's review makes between my work and Professor Redish's "adversary" First Amendment theory. I agree with Professor Krotoszynski that the theories are compatible in many respects.⁹⁵ In particular, Professor Redish's focus on autonomy-based democratic values is consistent with and indeed supports various aspects of First Amendment cosmopolitanism. I elaborate on this intersection below, focusing in particular on the relationship between First Amendment cosmopolitanism and democracy.

First, however, I should address the potential conflicts between the cosmopolitan and adversary theories. While First Amendment cosmopolitanism is consistent in many respects with Professor Redish's adversarial First Amendment theory, Professor Krotoszynski argues that the two approaches are on a collision course in other respects. He argues that insofar as cosmopolitanism advocates or anticipates changes to fundamental anti-paternalistic free speech doctrines and ideals, it "rests in considerable tension with Redish's robust arguments for an uninhibited and wide-open marketplace of ideas."⁹⁶

As Part III of this response suggests, I think the potential for conflict is overstated.⁹⁷ As Professor Krotoszynski observes, one of cosmopolitanism's central features is preservation of robust transborder First Amendment liberties. Thus, as he correctly observes, "the accident of geography should not provide any basis for greater censorial power on the part of the state."⁹⁸ So encapsulated, "a cosmopolitan First Amendment would embrace the values

⁹⁵ See Krotoszynski, *supra* note 1, at 670.

⁹⁶ *Id.*

⁹⁷ See *supra* Part III.

⁹⁸ Krotoszynski, *supra* note 1, at 688.

and underlying theory of an adversarial First Amendment.”⁹⁹ It would pose no immediate or existential threat to current First Amendment doctrines relating to commercial speech, incitement, hate speech, and other exceptional elements of American free speech law. Indeed, in some cases it would expand the geographic domain of these protections.

As I have suggested, First Amendment cosmopolitanism does propose that Americans exhibit greater respect for the diversity of liberty regimes throughout the world, and that we work toward better justifying and explaining First Amendment doctrines and principles to an increasingly skeptical global audience. However, as I make clear in the book, respectful engagement with the community of nations on these issues does not entail adopting foreign or international standards. For example, limited judicial enforcement of foreign laws and judgments would not result in wholesale abandonment of First Amendment anti-paternalism principles. Thus, under a cosmopolitan regime, one would generally find that the First Amendment remains distinctly adversarial and decidedly anti-paternalistic. If there are to be changes in these postures, they would come as a result of democratic deliberation and autonomous choice—activities that are wholly consistent with Professor Redish’s democratic conception.

One important area of overlap between First Amendment cosmopolitanism and Professor Redish’s theory relates to the central importance of democratic values to each approach. In *The Cosmopolitan First Amendment*, I argue that cosmopolitanism is consistent with traditional First Amendment values, including the search for truth, self-government, and individual autonomy.¹⁰⁰ I contend that “we need not start entirely from scratch to justify a more cosmopolitan conception of First Amendment liberties.”¹⁰¹ In particular, I stress that self-government and marketplace values, properly conceived, support a more cosmopolitan approach to the First Amendment.

Professor Redish and I both find traditional self-government and marketplace theories wanting. Professor Redish contends that these theories are fundamentally flawed owing to their internal inconsistencies and incorrect assumptions regarding democracy itself.¹⁰² I argue that traditional First Amendment theories place too much emphasis on demonstrable connections to domestic politics. In place of this narrow conception of democracy, I contend that we ought to conceive of a twenty-first century analog to Alexander Meiklejohn’s town hall meeting—“an emerging global theater, an agora that includes both traditional and digitized forms of transborder exchange and information flow.”¹⁰³ As well, cosmopolitanism argues that the marketplace of ideas does not cease to exist at the water’s edge. It not only expands the

⁹⁹ *Id.*

¹⁰⁰ See ZICK, *supra* note 2, at 68–70 (discussing traditional theories).

¹⁰¹ *Id.* at 85.

¹⁰² See REDISH, *supra* note 2, ch. 3 (critiquing self-government theories).

¹⁰³ ZICK, *supra* note 2, at 85 (citation omitted).

conception of domestic politics to include transborder concerns, but also seeks to ensure that citizens have access to a wide range of information—much of which may have nothing to do with casting a ballot or informing debate on local politics.¹⁰⁴

Like Professor Redish, I propose that we think more carefully about the fundamental relationship between First Amendment liberties and democracy. One facet of that relationship, which is located at the core of Professor Redish's adversary theory, is the connection between individual autonomy and democracy. Professor Redish's work examines what it means to be a self-governing individual in a contemporary democracy. Under his adversarial approach, democracy is conceptualized such that it "guarantee[s] each individual the equal opportunity to affect the outcomes of collective decisionmaking by lawful means, according to her own interests and values as she understands them."¹⁰⁵ As Professor Redish explains, "the adversary theory of free expression provides complete protection to democratic autonomy in all its manifestations."¹⁰⁶ Under the adversary approach, government is not permitted to restrict expression and the free flow of information on the ground that it does not relate to or further collective democratic ends. The choice of what to say, and what information to pursue and consume, is left primarily to the individual's discretion.

Professor Redish's focus on democratic individualism complements and supports a more cosmopolitan approach to First Amendment liberties. The free exercise of democratic autonomy must include the ability to travel abroad, to speak with foreign audiences, to receive and gather information from foreign sources, and to collaborate across borders. It must also entail taking full advantage of new channels of digital conversation and commingling. As Jack Balkin has observed, traditional self-governance justifications for free speech are "too narrow in the age of the Internet."¹⁰⁷ Professor Balkin also notes that in the twenty-first century, people's exchanges and collaborations often do not "respect national borders."¹⁰⁸ Thus, he argues, these activities "should not be protected only because and to the degree that they might contribute to debate about American politics, or even American foreign policy."¹⁰⁹ Rather, Balkin contends, they ought to be protected insofar as they contribute to "democratic culture"—a "culture in which individuals have a fair opportunity to participate in the forms of meaning making that constitute them as individuals."¹¹⁰

¹⁰⁴ *Id.*

¹⁰⁵ REDISH, *supra* note 2, at 71.

¹⁰⁶ *Id.* at 72.

¹⁰⁷ Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 438 (2009).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 438–39.

¹¹⁰ Balkin, *supra* note 78, at 3.

As I explain in my book, Professor Balkin's cultural theory is cosmopolitan in important respects.¹¹¹ Modern forms of democratic self-governance are increasingly characterized by mass participation and collaboration across geographically dispersed cultures. As Professor Balkin observes, the focus of free speech and association is shifting from political expression to non-political expression and popular culture. Thus, in the modern era, officials ought to focus on adopting policies that facilitate a wide array of digital conversation and commingling. The resulting information flow, which will increasingly traverse territorial borders, will facilitate the formation of an individualistic democratic culture that is less dependent on territorial borders, less concerned with the casting of ballots, and less grounded in collective democratic concerns.

As First Amendment cosmopolitanism recognizes, transborder conversation and commingling allow individuals separated by thousands of miles to learn from one another, to share and critically examine political, legal, religious, and cultural differences, and to acquire new perspectives regarding these and many other matters.¹¹² Democracy in transborder spaces, including virtual and tangible forums, will arise from and be defined by individual autonomy and self-interest rather than pre-defined collective goals.

Professor Redish's autonomy-based democratic theory complements and reinforces cosmopolitan objections to various limits on cross-border communications. His adversarial First Amendment would presumably reject the position that speech can be restricted solely because it is directed to individuals who are not part of the American political community. Its principles also suggest that governmental exclusions of foreign materials, persons, and ideas, some export controls that limit the sharing of technical information, and flat bans on the dissemination of U.S. foreign policy documents inside the United States would implicate and perhaps violate the First Amendment. Under both adversarial and cosmopolitan approaches, individuals would decide, based on their own self-interests, which otherwise legal communications and associations they would participate in or join.

V. CONCLUSION

In sum, in an era characterized by rapid changes in communications technologies and cross-border intersections, we ought not to allow narrow conceptions of democracy to inhibit the free flow of persons, information, and ideas across borders. Whether based on Professor Balkin's notion of democratic culture, Professor Redish's adversarial individualism, or principles of First Amendment cosmopolitanism, it is imperative that First Amendment theories and justifications be capable of meeting twenty-first century challenges. Development of theories that protect democratic autonomy "in all

¹¹¹ ZICK, *supra* note 2, at 88–89.

¹¹² *Id.* at 89 (citation omitted).

its manifestations” is critically important—not only to domestic political communities, but also to the peoples and regimes of the world. As I wrote in the final paragraph of *The Cosmopolitan First Amendment*:

What the people of the world will need—indeed, what they have always needed—in order to prevail in [the] battle [against repression] is a repository of wisdom and experience that demonstrates these things: Why freedom must prevail over repression; why access to information is a universal good; why respect for expressive and religious pluralism is critical to global peace; and why self-governance and self-determination are the destiny of all mankind. These are the familiar lessons of the First Amendment.¹¹³

¹¹³ *Id.* at 374.

